No. 89-1154

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

SHELL OFFSHORE, INC.,

Petitioner,

VERSUS

ROBERT GATES, TOTAL SERVICES, INC.
and NORTHWEST INSURANCE COMPANY,

Respondents.

GATES' OPPOSITION TO PETITION FOR CERTIORARI

William Rutledge
Domengeaux & Wright
Post Office Box 3668
Lafayette, Louisiana 70502-3668
Telephone: 318-233-3033
800-252-1953 (USA)
COUNSEL FOR RESPONDENT
ROBERT GATES

THE QUESTION PRESENTED FOR REVIEW

Is an award of prejudgment interest on future damages allowed in a tort case arising on a platform (an "artificial island") on the Outer Continental Shelf offshore Louisiana because the Shelf Act adopts Louisiana law which allows prejudgment interest in tort cases on all damages, both past and future?

43 U.S.C. § 1333(a)(2)(A); La. Stat. Anno., Rev. Stat. 13:4203.

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Respondent ROBERT GATES respectfully requests that this Court deny the petition for certiorari, seeking review of the Fifth Circuit opinion in this case. That opinion is reported at 881 F.2d 215.

STATUTES INVOLVED

43 U.S.C. § 1333(a)(2)(A):

> To the extent that they are applicable and not inconsistent with this subchapter or with other Federal laws and regulations of the Secretary now in effect or hereafter adopted, the civil and criminal laws of each adjacent

> State, now in effect or hereafter adopted, amended, or repealed are hereby declared to be the law of the United States for that portion of the subsoil and seabed of the outer Continental Shelf, and artificial islands and fixed structures erected thereon, which would be within the area of the State if its boundaries were extended seaward to the outer margin of the outer Continental Shelf, and the President shall determine and publish in the Federal Register such projected lines extending seaward and defining each such area. All of such applicable laws shall be administered and enforced by the appropriate officers and courts of the United States, State taxation laws shall not apply to the outer Continental Shelf.

LSA-R.S. 13:4203:

> Legal interest shall attach from date of judicial demand, on all judgments, sounding in damages, *'ex delicto'*, which may be rendered by any of the courts.

REASONS FOR DENYING THE WRIT:

> SHELL'S PERCEIVED POLICY CONSIDERATIONS ARE IRRELEVANT, IF NOT ILLUSORY. THE PETITION PRESENTS NO POINT WORTHY OF REVIEW.

Hardly more than seven years ago the Circuit Court allowed the prejudgment interest provided by Louisiana law; Shell

sought review then; certiorari was denied.[1] Now Shell is back again for a second try, a "petition for rehearing" after a denial of *certiorari*, so to speak.

Shell complains now that the Circuit judgment here requires it to pay prejudgment interest on future damages. That judgment does because the Shelf Act adopts Louisiana law. That provides prejudgment interest on all elements of damages, past and future.

Shell does not complain because prejudgment interest was awarded on past damages. Its plea is that "this Court rule that in an Outer Continental Shelf Lands Act case a plaintiff is not entitled to prejudgment interest on an award of future damages." It does not contend that prejudgment interest should not be awarded at all. For it is settled Circuit law that prejudgment interest should be awarded in tort cases arising out of an accident occurring on a Shelf platform offshore Louisiana because such interest would be awarded onshore Louisiana; for Congress intended that the fellow hurt offshore be treated the same as the fellow hurt on shore, so far as practical.

Shell presents no novel issues here, no radical application, no unsettled questions. The Circuit Court had held in several cases in the past that laborers such as Gates were entitled to prejudgment interest, with no distinction made between past and future damages, because that is the settled Louisiana law.

Shell's complaint about this is apparently based on arguments concerning logic and policy. It seems to assert that the intent of Congress and the Louisiana Legislature should be

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1. *Olsen v. Shell Oil Co.*, 708 F.2d 976 (5th Cir., 1983), *cert. den.*, 464 U.S. 1045 (1984).

rejected because these statutes in this respect are unsound; "patently absurd"; that the validity of legislative acts should be judicially declared only when they are sage, not silly; that what Congress and the Louisiana Legislature did silly, this Court should make right by judicial legislation amending the two legislative acts; that the federal statute should be amended by this Court to say that state law shall be applied where not inconsistent but only where state law is wise and reaches the proper result; that no matter what Congress actually said, this Court should make it that way.

Shell made all of these arguments to a panel of the Circuit Court composed of experienced Louisiana lawyers and judges, who had no doubt about what the Louisiana law was or how it should be applied here.

Shell's argument here was unanimously rejected there and then unanimously rejected by the entire court upon Shell's move for rehearing *en banc*.

Shell then asked the Circuit Court to stay execution pending its petition for certiorari; again, the panel unanimously refused to do so; while it did not say why it refused, the only reason for declining to stay this simple money judgment was that it considered such a petition legally frivolous and, in a very real if not legal sense, presenting "no substantial federal question."

The Circuit Court's tone clearly shows that it felt the point routine and the conclusion foregone:

> In the face of our own prior decisions under the OCSLA allowing prejudgment interest on future damages, as well as unanimous Louisiana authority interpreting L.S.A.-R.S. 13:4203 as allowing prejudgment interest on future damages, we find that prejudgment

> interest should have been awarded on Gates' entire award.[2]

In terms of policy, Shell speaks sharply about a "patently absurd state law." We hope we reply to this as patiently and objectively as advocacy will allow.

Obviously, the Louisiana Legislature intended to bestow a relatively mild and minute punitive extra in tort cases as an element of substantive damage when it provided for such prejudgment interest. (For this is allowed only in tort cases, "judgments *ex delicto*.")[3]

It gives a little more than compensatory damages to the extent that it applies to all damages, past and future. It is substantive;[4] it is recoverable though the complaint fails to request it and the judgment fails to grant it; in effect, it is a substantive legislative award that "runs with the judgment," so to speak, though not mentioned anywhere in the suit;[5] so substantive that it is not varied after suit is filed by purportedly retroactive statutory amendments;[6] it runs from

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2. *Gates v. Shell Offshore, Inc.*, 881 F.2d 215 (5th Cir., 1989), at 218.

3. *Davis v. LeBlanc*, 149 So.2d 252 (La.App., 1963).

4. *Merchant v. Montgomery Ward & Co.*, 83 So.2d 920 (La.App., 1920); *New Amsterdam Cas. Co.*, 167 F.2d 767, *cert. den.*, 335 U.S. 822 (1948).

5. *Broome v. Gauthier*, 443 So.2d 1127 (La.App., 1983), *writ den.*, 462 So.2d 1251; *Cooley v. Allstate Ins. Co.*, 443 So.2d 1127 (La.App., 1983), *writ den.*, 462 So.2d 449.

6. *Hunter v. Laurent*, 158 La. 874, 104 So. 747 (1925); *Winzer v. Lewis*, 250 So.2d 650, *writ den.*, 259 La. 934, 253 So.2d 379 (1971; *Hebert v. Travelers Ins. Co.*, 245 So.2d 563 (La.App., 1971).

"judicial demand," the date suit is filed.[7] Again, it is limited to tortious conduct.[8] No distinction is made between past and future damages.[9]

Such an extra could have taken different forms, some much more onerous; it could have provided for double or triple damages; or punitive damages; or attorney's fees.

Instead, the Louisiana legislature provided, wise or not, this extra of prejudgment interest on all elements instead.

Some states, including Louisiana, have triple damages for trespass against timber, even accidentally; others, double damages for trespass against branded cattle, although in the best of faith.

But Louisiana has no punitive damages, by that name, (outside of drunken-driving and toxic-tort cases), no matter how wanton the injury may be.[10]

So, in Texas, Shell complains stridently to the federal courts about punitive damages on the Shelf: that it does not have to pay such damages when such an accident happens offshore Louisiana. Then, in Louisiana, it protests dramatically that it does not have to pay such prejudgment interest when the accident happens offshore Texas; trying to play one law, one state, off against the other to Shell's advantage.

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7. *Guidroz v. Tauzin*, 413 So.2d 682 (La.App., 1982).

8. *Davis v. LeBlanc*, 149 So.2d 252 (La.App., 1963).

9. *Schackai v. Tenneco Oil Co.*, 436 So.2d 729 (La.App., 1983), *writ den.*, 440 So.2d 759.

10. *Baggett v. Richardson*, 473 F.2d 863 (5th Cir., 1973).

Surely Louisiana workers would rather have the grand gain from punitive damages rather than the petty benefit from such prejudgment interest; but they cannot have it because the Louisiana Legislature, in its wisdom, saw fit to give them, but only in tort cases, a few nickels more prejudgment interest, instead, as a comparatively gentle punitive reminder to the wrongdoers of their "delects."

If the Louisiana Legislature said to Shell, *"All right, we agree with you; we made a mistake; we are going to repeal our law of prejudgment interest on future damages; but we are also going to adopt the concept of punitive damages, like they have got all along the Coast, in Texas, Mississippi, Alabama, Florida, for injured workers."* Can there be any doubt about Shell's reaction to that? Its yellow shell would blanch.

Punitive damages may look to some people, including Shell, as "patently absurd"; but they are awarded in Shelf Act cases offshore in all the states bordering the Gulf; all except one, Louisiana.

Gates' case has lasted eight years; two trials, two appeals, two petitions for rehearing, and now this petition for certiorari; maybe it would be better to give Gates a commensurate award of attorney's fees rather than a few nickels more prejudgment interest; but the Louisiana Legislature has not seen fit to do so.

Suppose Louisiana allowed no prejudgment interest whatever, and Gates argued "patent absurdity"; is there any doubt about Shell's reply?

Is Shell asking this Court to limit the adoption of state law to that which it considers wise? If so, on what basis? Judicial legislation; that is all Shell is asking for.

Prejudgment interest does tend to accumulate in Shell's cases, but it has the use of the money for years at a judicial rate, generally much better than the market; for Shell, the present case was over quickly; but it still probably saved money in the long run, even with prejudgment interest on all elements of damage; Shell does better in other cases, more like fifteen years:[11]

> Lest our silence be taken as expression of other than frustration, we pause to note the consumption of thirteen years to decide these cases, to date. It is not a pleasing story for counsel, court, or the Congress. This is too long for widows and children. Without attempting to assess blame for all the systemic cracks into which these cases fell, the snail's pace was not fair. At some point it ceases to be justice.

Mary Olsen v. Shell Oil Co., 708 F.2d 976 (5th Cir.1983), at 985.

Nor can Shell take any realistic comfort from the fact that the Circuit Court had to reverse the District on this point. Shell urged upon a busy District Court a fallacy well known to Shell at the time it did so: that since admiralty does not allow prejudgment interest on future damages, none should be allowed here in this case involving the *Lands Act*. Shell clearly saw the distinction but failed to point it out as it led the District Court into error. As the Circuit Court described it, *"Relying on Martin v. Walk, Haydel & Associ-*

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11. *Olsen v. Shell Oil Co.*, 595 F.2d 1099 (5th Cir., 1979), *cert. den.*, 444 U.S. 979; 561 F.2d 1178; *reh. den.*, 565 F.2d 163; 574 F.2d 194; *after remand*, 708 F.2d 976, *reh. den.*, 717 F.2d 1339; *cert. den.*, 464 U.S. 1045 (1984).

ates, Inc., 794 F.2d 209, 212 (5th Cir., 1986) (prejudgment interest on future damages not allowed in admiralty), the trial court granted Shell's post-trial motion disallowing prejudgment interest on the future damage award."

There appears to be no reason for certiorari: no conflict with another Federal Court of Appeals, nor with a state court of last resort; no departure from the accepted and usual course of judicial proceedings; no decision of an important question of federal law; no conflict with the federal Constitution; no conflict with applicable decisions of this Court; no substantial question of widespread national importance; and, actually, no substantial federal question at all.

Gates' case does not involve hazards to navigation, neither air nor sea; nor to seabed pipe lines; nor oil-gathering facilities, nor pollution; nor toxic waste; all concerns of the Secretary of Interior, the Secretary of Transportation, the Secretary of Commerce, the Coast Guard, and the Army Engineers.

This case is merely a common damage suit for a back injury arising out of an industrial accident; embracing nothing but settled points of law; and, even if they were unsettled, not of such a nature as to make them worthy of certiorari.

If Shell's complaint here were proper, it would amount to bare judicial error about a corollary of application so minutely capillary in dimension that it should be left at Circuit level since there is no Circuit conflict.

But the Circuit ruling is correct in every respect:

THE CIRCUIT COURT'S RULING IS CORRECT. IT IS BASED ON CONTROLLING PRECEDENT AND SETTLED LAW.

The Circuit Court held that Gates was entitled to prejudgment interest on all elements of recovery. That is the Louisiana law. And that law is adopted. It is not inconsistent because judge-made admiralty, maritime, or federal common law may be to the contrary.

The Shelf Act says that state law is "*hereby declared to be the law of the United States for that portion of the subsoil and seabed of the outer Continental Shelf, and artificial islands, and fixed structures erected thereon . . . .*"

Such state laws are declared to be the law of the United States "*to the extent that they are applicable and not inconsistent with this subchapter or with other Federal laws and regulations of the Secretary now in effect or hereafter adopted . . . .*" 43 U.S.C. § 1333(a)(2)(A).

It is Shell's argument that when Congress talks about inconsistent federal law, it means judge-made federal law; and that since maritime law does not provide for prejudgment interest on future damages, that generates an inconsistency which bars the application of Louisiana law.

Three times in a long decade this Court had held to the contrary. *Rodrigue v. Aetna Casualty & Surety Co.*, 395 U.S. 352 (1969); *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971); and *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473 (1981).

In cases involving death, contributory negligence, laches, this Court rejected arguments that conflicting maritime law could be used to create the inconsistency. *Gulf Offshore*, cited immediately above, 453 U.S. 487:

> In *Chevron*, we held that Louisiana rather than federal common law provided the federal

> statute of limitations for personal injury damages actions under OCSLA. We recognized that "Congress made clear provision for filling the 'gaps' in federal law; it did not intend that federal courts fill those 'gaps' themselves by creating new federal common law."

If federal common law or maritime law were the law Congress intended to create inconsistency, then the provision for adopted state law would be virtually nullified, for it is the nature of maritime and common law to grow to apply to every new situation.

The Circuit Court, in *Mary Olsen v. Shell Oil Co.*, 708 F.2d 976 (5th Cir., 1983) applied the teachings of these three precedents in holding that the Louisiana statute awarding prejudgment interest was applicable and not inconsistent. The *Olsen* decision has become settled law in the Circuit, *Bartholomew v. CNG Producing Co.*, 832 F.2d 326 (5th Cir., 1987); *Hass v. Atlantic Richfield*, 799 F.2d 1011 (5th Cir., 1986). As the Circuit Court held in *Olsen*, 708 F.2d 980:

> The implication of *Rodrigue* and *Huson* is that whenever an action is based on "surrogate" Louisiana law, . . . Louisiana law provides all aspects of the remedy. . . . Our view of the wisdom of a rule is not here the index of its application. That we view the rule as integral to a tort system is important here.

The federal statute concerning interest, 28 U.S.C., § 1961, covers post-judgment interest; but it does not say that there will be post-judgment interest and only post-judgment

interest in these Shelf Act Cases that incorporate state law.[12] As the Circuit Court held in *Frederick v. Mobil Oil Corp.*, 765 F.2d 442 (5th Cir., 1985), at 449:

> Finally, Mobil argues that the district court erroneously awarded prejudgment interest on the damages assessed by the jury. This argument is premised on the notion that the federal interest statue, 28 U.S.C. § 1961, [set forth in footnote] applies in this case and that it specifically precludes an award of prejudgment interest. This argument is foreclosed by *Olsen v. Shell Oil Co.*, 708 F.2d 976 (5th Cir. 1983), *cert. denied*, 464 U.S. 1045, 104 S.Ct. 715, 79 L.Ed.2d 178 (1984). In *Olsen*, we noted that our decisions on the award of prejudgment interest in OCSLA cases have not always reached uniform results. We sought there, however, to harmonize our decisions and to discern a path for future cases. For reasons that we need not repeat here, we held in *Olsen* that (1) section 1961 does not, as Mobil contends, preclude an award of prejudgment interest; (2) prejudgment interest is proper in an OCSLA case to the same extent that it is permitted by the law of the state that has provided, as surrogate federal law, the substantive rules of decision governing the case; and (3) in an OCSLA case applying Louisiana law, La.Rev. Stat. § 13:4203 provides adequate support for an award of prejudgment interest.

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12. "A federal statute, 28 U.S.C. § 1961, fixes the *post*-judgment interest rate for federal cases . . . . But prejudgment interest is governed by federal common law, [no adoption of state law being involved] . . . ." *Gorenstein Enterprises v. Quality Care-USA*, 874 F.2d 431 (7th Cir., 1989), at 436.

> *Olsen* controls this case, and we need not repeat its reasoning here. It is sufficient to note that Mobil's argument is based entirely on pre-*Olsen* cases that in *Olsen* were expressly distinguished or explained away.

Shell cites cases under the Jones Act and the FELA. The distinction is simple. Neither the FELA nor the Jones Act has a provision adopting state law. These Acts involve national and international arteries of commerce where uniformity is paramount.

Gates might not expect to get prejudgment interest under the FELA. But he would get prejudgment interest in a tort case if he were hurt onshore Louisiana in oil operations; and the clear intention of Congress, that the fellows on the platform offshore should get equal treatment, was the prime reason that Congress rejected maritime and federal common law.

Shell talks about the law of enclaves: there is a variety of such laws governing areas of federal proprietorship, federal territories, and Indian Country; some may have their own peculiarity that produces different results. But the provision about enclaves in the Shelf Act *adopts* state law.

If such adoption were applied upland Louisiana, it would simply mean that oil workers drilling a well on the prison grounds inside the federal penitentiary at Oakdale, Louisiana, would receive about the same treatment in their tort cases against parties such as Shell as those workers drilling for oil a hundred yards outside that prison.

Shell tries to make much of the fact that the Circuit Court had to reverse itself in *Olsen* to allow prejudgment interest under Louisiana law. But it reversed itself because it had gotten reversed when it tried before to apply decisional maritime law. So, it concluded that, "*Section 1961 [the*

Federal interest statute] does not by its silence bar the awarding of prejudgment interest . . . ." *Olsen*, above, at 708 F.2d 984.

If state law is to control such things as time limitations and instructions about income tax, as in *Huson* and *Gulf Offshore*, obviously state law applies on the question of prejudgment interest. And since it applies, it applies across the board in Louisiana because that is what its state law provides. As *Huson* held, 404 U.S. 103:

> Congress also recognized that the "special relation between the men working on these artificial islands and the adjacent shore to which they commuted" favored application of state law with which these men and their attorneys would be familiar. [Cases cited.] If Congress' goal was to provide a comprehensive familiar body of law, it would defeat that goal to apply only certain aspects of a state personal injury remedy in federal court. A state time limitation upon a remedy is coordinated with the substance of the remedy and is not less applicable under the Lands Act.

Chevron Oil Co. v. Huson, 404 U.S. 97 (1981), at 103.

Again, the idea that the fellow hurt offshore should be treated, so far as practical, as the fellow hurt on shore; this idea is also the thread of principle that has run through all of this Court's decisions concerning the adoption of surrogate law.

Shell admits that Gates is entitled to prejudgment interest on all elements of damages except future ones. That so, this is dead certain: The rationale that led the Circuit Court in *Olsen* to grant prejudgment interest; such rationale inevitably and necessarily leads to the Circuit conclusion that such

prejudgment interest covers all damage, past and future: this just as surely as night follows the sun.

And *Olsen's* conclusions are in full obedience to the ruling precedent that this Court laid down three times in eleven years.

When Shell admits that Gates is entitled to prejudgment interest, but claims that is limited to past damages, Shell virtually concedes that its petition is legally frivolous and that there is, in effect, no real substantial federal question.

Obviously when Congress adopted state law, it adopted state law whether good, bad, indifferent; strong or weak; sound or silly. The only exception is inconsistency. And that inconsistency is not created by judge-made maritime nor common law.

Shell is fair here, eminently fair. All it wants is a fair advantage. In the past, Shell has forcefully and successfully asserted on these "artificial islands" the state law of contributory negligence where the slightest neglect on the part of the injured worker totally barred his recovery; and the quick-fuse of the state limitations that blasts him out of the courtroom in a short twelve months where he had the flexible doctrine of laches before.

Now, the only thing more Shell asks is a rose without a thorn. If Louisiana law applies to liability, surely it applies to damages, including all elements of prejudgment interest.

The Circuit Court did nothing more here than to recognize state law; declare that the law is the law; and properly apply it as surrogate law here, as clearly mandated by this Court.

If Shell finds this distateful, it can do what the rest of us have to do, go to Congress, go to the Louisiana Legislature, go to both, and have the law changed. It has had seven years

since *Olsen* to do so, instead of trying to produce judicial legislation here, clearly against the will of Congress, as demonstrated by this Court.

If this had been a simple diversity case upland Louisiana, Gates would have been awarded such prejudgment interest as a matter of course. *Texaco, Inc. v. Lirette*, 410 F.2d 1064 (5th Cir., 1969). Surely, he should get the same off-shore Louisiana on an "artificial island" on the Shelf.

Shell's curious complaint is that the Louisiana laws of judicial interest and tort damages combine to put Shell at penny risk but keep it pound safe; this odd sort of alligator tears is found only along the Louisiana seaboard and its share of the Shelf. The Louisiana Legislature gives Shell the real break here, not Gates.

Suppose that Gates had begged the Shell man not make him pick up a heavy piece of equipment without some help, but the Shell man gave him a direct order to do so despite Gates' protest, and Gates got permanent spinal injury as thanks for his effort; on this the jury could have certainly found Shell's misconduct wanton; but such a finding would have been irrelevant since Louisiana law allows no punitive damages no matter how wanton, no matter how willful the misconduct of a tort defendant.

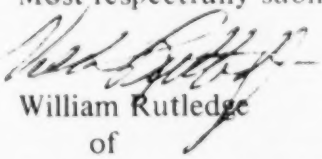
Finally, Shell protested to the Circuit Court that Gates was trying to make people like a state law about judicial interest that they should dislike; Gates is not trying to make anybody like anything.

But precedent is precedent; the law is the law, like it or not.

CONCLUSION

Review should be denied.

Most respectfully submitted,



William Rutledge
of
Domengeaux & Wright
Post Office Box 3668
Lafayette, Louisiana 70502-3668
Telephone: (318) 233-3033
1-800-252-3106 (La.)
1-800-252-1953 (USA)
Counsel for Robert Gates

CERTIFICATE OF MAILING

I hereby certify that I have on this 7th day of February, 1990, mailed copies of the foregoing, properly addressed and postage prepaid, to each counsel of record:

Atty. Jon D. Picou
Bailey & Leininger
3445 N. Causeway Boulevard, Suite 801
Metairie, Louisiana 70002

Atty. Jeffrey Lozes
Lozes, Cooper & Lozes
1010 Common Street, Suite 850
New Orleans, Louisiana 70112

William Rutledge